SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 9 1961
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 487

DEHYDRATING PROCESS COMPANY,
PETITIONER,

v.

A. O. SMITH CORPORATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

WARREN F. FARR
50 Federal Street
Boston 10, Massachusetts

JAMES N. JOHNSON
JOHN M. HARRINGTON, JR.
WILLIAM D. ANDREWS
ROPES & GRAY
PORTER, LAURITZEN, QUALE, PORTER & ZIRBEL
Of Counsel

PRESS OF GEO. H. DEAN CO., BOSTON

TABLE OF CONTENTS

	Page
OPINION BELOW	1
QUESTION PRESENTED	2
STATEMENT	2
ARGUMENT	5
CONCLUSION	13

CITATIONS

Cases

Allied Equipment Co. v. *Weber Engineered Products, Inc.*, 237 F.2d 879 (4th Cir. 1956) 9

Dehydrating Process Company v. *A. O. Smith Corporation*, 292 F.2d 653 (1st Cir. 1961) 1, 5, 8

Federal Trade Commission v. *Sinclair Refining Co.*, 261 U.S. 463 7

General Talking Pictures Corporation v. *American Telephone & Telegraph Co.*, 18 F. Supp. 650 (D. Del. 1937) 7

Hunter Douglas Corp. v. *Lando Products, Inc.*, 215 F.2d 372 (9th Cir. 1954) 9

International Business Machines Corp. v. *United States*, 298 U.S. 131 ..... 6, 7, 9

International Salt Co. v. *United States*, 332 U.S. 392 ..... 6, 7, 9

Jerrold Electronics Corp. v. *United States*, 81 S. Ct. 755 (1961) 7

McElhenny Co. v. *Western Auto Supply Company*, 269 F.2d 332 (4th Cir. 1959) 9

Leo J. Meyberg Co. v. *Eureka Williams Corp.*, 215 F.2d 100 (9th Cir. 1954), *cert. denied* 348 U.S. 875 9

Nelson Radio & Supply Co. v. *Motorola, Inc.*, 200 F.2d 100 (5th Cir. 1952), *cert. denied* 345 U.S. 925 9

Northern Pacific Railway Co. v. *United States*, 356 U.S. 1, 5, 10 ..... 6, 9

Pick Mfg. Co. v. *General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd* 299 U.S. 3 7

Standard Oil Co. v. *United States*, 337 U.S. 293 9

Times-Picayune Publishing Co. v. *United States*, 345 U.S. 594 6

United States v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), aff'd 81 S. Ct. 775 ..... 7, 10

United States v. *Parker-Rust-Proof Co.*, 61 F. Supp. 805 (E.D. Mich. 1945) 7

Williams v. *Hughes Tool Co.*, 186 F.2d 278 (10th Cir. 1950), *cert. denied* 341 U.S. 903 7

Statute

Clayton Act, 38 Stat. 731
Section 3, 15 U.S.C. §14 ..... 2, 5, 6, 7, 8, 9, 12

IN THE

Supreme Court of the United States

October Term, 1961

No. 487

DEHYDRATING PROCESS COMPANY,
PETITIONER,

v.

A. O. SMITH CORPORATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals is reported at 292 F.2d 653 and appears at pp. 13-20 of the Petition.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the judgment of the District Court for the defendant, which was entered upon a directed verdict, in this private treble damage action claiming that respondent violated Section 3 of the Clayton Act in making a sale of its mechanized storage system after petitioner had unsuccessfully attempted to buy one component thereof separately, where the mechanized storage system was a single product, there was no proof of any other sale made by respondent of its mechanized storage system, and no proof by petitioner of compensable loss arising from the purchase which it made?

STATEMENT

Petitioner, a processor of fish products, brought this action on August 6, 1959 against respondent, a manufacturer of mechanized storage units to recover triple damages allegedly sustained by reason of the defendant's alleged violation of Section 3 of the Clayton Act and Section 1 of the Sherman Act. At the conclusion of the trial the petitioner waived its claim with respect to the alleged Sherman Act violation (R.A. 181). The complaint (R.A. 1-8) alleged that the respondent, which manufactured a unit known as Permaglas Mechanized Storage Unit for storing food and agricultural products, refused to sell separately a mechanical sweep arm unloader used in the storage unit unless the plaintiff bought the complete unit; that the plaintiff did purchase four such units; and that "By reason of defendant's refusal to sell" the unloader unless the plaintiff bought the entire unit, plaintiff suffered substantial loss and injury to its business.

The case was tried to a jury and at the close of all the evidence for both petitioner and respondent, respondent moved for a directed verdict on the ground that there was no evidence on which the jury could find a violation of Section 3 of the Clayton Act, or on which it could find the amount of damages sustained by the

plaintiff as a direct and proximate result of said violation if any violation were shown (R.A. 209). The trial court directed a verdict for respondent (R. 202) and judgment was entered thereon.

The Court of Appeals for the First Circuit unanimously affirmed this judgment. Its opinion, while observing that the defendant urged a number of grounds, considered principally one ground, which the opinion stated went to the heart of the matter.

The evidence at trial had shown the following: The equipment manufactured by the respondent which is involved is a mechanized storage system consisting of a silo-like unit of glass coated steel and a mechanical unloader which unloads the silo by means of a sweep-arm which rotates horizontally about a pivot in the base of the glass coated silo and, by cutter hooks moving on the arm, directs the settling stored material out through a slot in the base. (R.A. 159, 161-162, 165, Petitioner's Exhibit 11, R.A. 98, 233, 237) The unloader was designed to be used as an integral part of the glass coated silo (R.A. 163). The unloader and the silo are both patented. The unit is sold for industrial purposes by its registered trademark "Permaglas Mechanized Storage Unit." (R.A. 10-11, 159, Petitioner's Exhibit 15, R.A. 105, 246-249)

During the period 1951 through 1957 respondent sold or allowed its then current national distributor, on an experimental basis, to sell unloaders separately to thirty-six customers for installation in storage units made by others. (R.A. 161) The experiment was a failure. Half of the thirty-six customers were dissatisfied with the unloader, either returning the unloaders for refund or making claims for damage against respondent and its distributor. (R.A. 161) On February 28, 1958, as a result of this unsatisfactory experiment, respondent decided to sell its mechanical sweep-arm unloader for use only in the structure for which it had been designed, i.e., the respondent's glass coated silo. (R.A. 163)

Petitioner became interested in a mechanical bulk storage system for its fish meal sometime prior to December, 1957. (R.A. 41, 83) Petitioner retained an expert who, prior to any knowledge by him of respondent's policy, recommended a Smith unloader and silo (R.A. 116).* Fish meal, which in storage becomes somewhat cakey and will "bridge", was a difficult material to handle. (Petitioner's Ex. 8, R.A. 92-93, 225) However, while its expert was negotiating on behalf of petitioner with respondent for its equipment, the petitioner by its Vice President Ryan, on April 11, 1953, entered into a contract with General American Transportation Corporation (hereinafter "General American") for the furnishing by General American of four General American non-glass coated steel tanks of welded watertight construction and four of respondent's unloaders (R.A. 42-43; Petitioner's Ex. 3, 4, R.A. 43, 215-221), the petitioner thereby intending to obtain tanks which would have the potential of being converted to storage of homogenized condensed fish, a liquid product. (R.A. 44-45, 64-66)

When General American was unable to obtain Smith unloaders because of respondent's decision to sell unloaders only as components of its own system (R.A. 18-19), petitioner ordered the Permaglas Mechanized Storage Units from Bromfield Manufacturing Co., Inc. (R.A. 61-62; Respondent's Ex. B, R.A. 61, 292), mechanical engineers and ship repairers, a company unrelated to respondent or petitioner, owned by Morton Bromfield's father (R.A. 106-107). Bromfield Manufacturing Co., Inc. ordered the said units from respondent (Petitioner's Ex. 16, R.A. 106, 251) and paid it therefor (R.A. 153-154; Petitioner's Ex. J.K. R.A. 305-312). Bromfield Manufacturing Co., Inc. in turn received payment from petitioner (R.A. 119-120, Petitioner's Ex. 22, R.A. 120, 259-265).

---

* Petitioner's statement that the expert, Morton Bromfield, became an agent for respondent (Pet. p. 4) is incorrect. (See R.A. 192.)

Petitioner then allowed General American to rescind its contract (R.A. 47-48, 58-59). The present action was brought by petitioner approximately one year after installation of respondent's system at its premises.

ARGUMENT

Although the petition does not clearly refer to any of the recognized reasons for granting a writ of certiorari (Revised Rules of the Supreme Court of the United States, Rule 19), presumably what it is trying to assert is that the decision of the Court of Appeals is not in accord with applicable decisions of this Court. Thus, it claims (Pet. p. 2) that the Court below did not follow the "*per se* rule of this Court" with respect to tying arrangements. But this claim—the only reason advanced which might justify granting the petition—cannot be supported. It rests on a misconception both of the holding below and of the decisions of this Court cited in the petition.

What the cases cited by petitioner (Pet. p. 5) hold is that agreements by one party to sell (or lease) one product only on the condition that the buyer (or lessee) buys (or leases) a different and distinct product is a violation of Section 3 of the Clayton Act if the seller (or lessor) has sufficient economic power to impose appreciable restraint on competition in the tied product and if the volume of business in the tied product affected by the agreement is not "insubstantial".

The Court below fully recognized this principle. Indeed, it said: "We may agree with the plaintiff that the compulsory joining of two 'separate' articles is a per se violation of the act". (Pet. p. 16; 292 F.2d 653, 655) But, as it went on to point out, the very question at issue in this case was whether the unloader, a component of the patented storage system, had to be treated as a "separate" product which respondent was required to sell independently for installation in other types of storage containers. As this Court has held, no tying problem even arises unless there are two sepa-

rate and distinct items. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614, 627. See *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5, 10. In every case in which this Court has condemned tying arrangements, the tied and tying items were clearly separate and unrelated, as, for example, machines and cards (*International Business Machines Corp.* v. *United States*, 298 U.S. 131) or machines and salt tablets (*International Salt Co.* v. *United States*, 332 U.S. 392).

The petitioner thus begs the whole question in stating that the issue presented is whether "an admitted tie-in sale is a *per se* violation of Section 3 of the Clayton Act" (Pet. p. 2) and in asserting that the facts are clear that respondent has "no system or unit for sale, but rather two separate products" (Pet. p. 6). The sweep arm unloader in question was a component of a single mechanized storage unit (R.A. 159) specifically designed for use in a glass-coated steel container (R.A. 163). The whole unit was sold under the name Permaglas Mechanized Storage Unit (Petitioner's Ex. 15, R.A. 105, 249). Of course, the unloader was physically separable from the container. But almost any complex manufactured product can be broken down physically into separate components. Yet it would scarcely be contended that every manufacturer must sell separately each item which goes to make up the total product. Automobile manufacturers do not sell wheels or doors separate from the automobile as a whole. Sellers of men's clothing do not break up a three-piece suit and offer to sell the coat or the vest or the trousers as individual items.

Petitioner argues that the unloader must be treated as an independent product because respondent, as an experiment, for a time sold the unloader component separately for use in other systems. But that experiment demonstrated that the unloader could not be operated efficiently except in the container in which it was designed to be used. Obviously the unsuccessful effort to sell unloaders separately does not support petitioner's proposition.

Petitioner's reliance on *Jerrold Electronics Corp.* v. *United States*, 81 S. Ct. 755 (1961), affirming *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), is misplaced. That case involved the question whether a manufacturer of community television antennae systems violated Section 3 of the Clayton Act by insisting on selling the complete system as a single product. Despite the fact that the various parts making up the system could not normally be regarded as constituting a single product, that other manufacturers regularly supplied equivalent parts as individual items and that the defendant's practices over a period of years had attained for it 75% to 80% of the market, the District Court held that defendant's full-system sales policy was not a violation of the Act so long as it was justified by the considerations of requiring satisfactory performance and that it became a violation only after it ceased to be so justified. The Government did not appeal from that decision. The District Court's conclusion that defendant's policy was justified for a period of years was not, as petitioner claims (Pet. p. 8), "dictum" but a basic and essential part of its judgment. That holding, like the similar holding of the court below in this case, was no departure from decisions of this Court. Both courts followed and applied the well-settled rule that a seller or lessor may impose restrictions or requirements designed in good faith to assure satisfactory operation of the product sold or leased. See, *e.g.*, *International Salt Co.* v. *United States*, 332 U.S. 392, 397-398; *International Business Machines Corp.* v. *United States*, 298 U.S. 131, 139-140; *Pick Mfg. Co.* v. *General Motors Corporation*, 80 F.2d 641, 643 (7th Cir. 1935), *aff'd* 299 U.S. 3. *Cf. Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U.S. 463; *General Talking Pictures Corporation* v. *American Telephone & Telegraph Co.*, 18 F. Supp. 650, 666 (D. Del. 1937); *Williams* v. *Hughes Tool Co.*, 186 F. 2d 278, 285 (10th Cir. 1950), *cert. denied* 341 U.S. 903; *United States* v. *Parker-*

Rust-Proof Co., 61 F. Supp. 805, 813 (E.D. Mich. 1945). The court below pointed out that if others had made containers which would satisfy the requirements for proper operation of respondent's unloader, there might have been no justification for respondent's insistence on the unloader being sold for use only in its own storage unit. But there was no evidence in the record to show that such containers were available. The case thus differs markedly from *International Business Machines* and *International Salt*, in which there was affirmative proof that competitors did in fact make products which worked perfectly in the lessor's machines.

Petitioner asserts that "there was proof that others had made tanks in which respondent's unloaders could and did perform satisfactorily" (Pet. p. 7). But it does not support this assertion by any reference to the record. It could not do so because the proof was to the contrary. As the opinion of the Court of Appeals sets forth (Pet. p. 17; 292 F.2d 653, 656), over a seven-year experimental period 50% of the customers who had installed the unloader in silos made by others expressed positive dissatisfaction with the operation of the unloader, either making claims or returning them for refund.

But even if there had been a "tie-in" sale of two separate items, as petitioner claims, the judgment for respondent was correct since there was no proof whatsoever as to the substantial effect on competition or the tendency to a monopoly required to establish a violation of the Clayton Act. The only sale shown was a single sale to one purchaser of four Permaglas Mechanized Storage Units (Petitioner's Ex. 16, 17, R.A. 106, 108, 251-253). There was no proof of any sales except the one in question. The evidence did establish that on February 28, 1958 respondent made a decision not to sell the unloader except for installation in the permaglas container for which it had been designed (R.A. 17, 163, 168, 173) and that pursuant to that policy it did refuse to sell unloaders separately to General American (R.A. 18-19); and that it advised other inquiring cus-

tomers of that policy (R.A. 17-22). But there was no showing that since 1958 respondent has, in fact, ever sold any storage systems whatsoever to anyone else.

Of course, neither a policy of refusing to sell nor actual refusals to sell constitute a violation of Section 3 of the Clayton Act. What the Act forbids is a "sale". Without proof of actual sales, no violation is shown. *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952) *cert. denied* 345 U.S. 925; *Leo J. Meyberg Co.* v. *Eureka Williams Corp.*, 215 F.2d 100 (9th Cir. 1954), *cert. denied* 348 U.S. 875; *Hunter Douglas Corp.* v. *Lando Products, Inc.*, 215 F.2d 372, 376 (9th Cir. 1954); *Allied Equipment Co.* v. *Weber Engineered Products, Inc.*, 237 F.2d 879 (4th Cir. 1956); *McElhenny Co., Inc.* v. *Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959). Since in this case there was only one sale, petitioner could hardly establish that that single sale tended to substantially lessen competition or create a monopoly.

This Court has repeatedly pointed out that a tying arrangement is invalid if, and only if, the volume of business affected by the arrangement is "not insubstantial" and competitors are "foreclosed from a substantial market". *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 11; *International Salt Co.* v. *United States*, 332 U.S. 392, 396; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 304-305. In each of the cases in which tying clauses have been condemned, there was affirmative proof of a series of sales or leases extending over a period of years and as to the extent of the market in the tied product and the amount of business affected by the tying clause. Thus, in *International Business Machines Corp.* v. *United States*, 298 U.S. 131, the lessor annually sold 3,000,000,000 cards, or 81% of the tied product, and derived annual gross receipts of $3,192,700 therefrom. In *International Salt Co.* v. *United States*, 332 U.S. 392, the lessor had about 900 leases outstanding containing the tying provision and in one year sold 119,000 tons of salt (the tied product) for $500,000. In *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, over a thousand leases, covering several million

acres of land, containing "preferential routing" clauses were characterized by this Court as a "host of tying arrangements". In *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd* 81 S. Ct. 775, the defendant had command of from 75% to 80% (187 F. Supp. at 554, 555) of the market for the tying and tied products.

In the present case, however, the record is utterly barren of any evidence as to the extent of the market in unloading devices or in silos or as to the extent to which competitors were or could have been "foreclosed" from any part of either market. The respondent was one out of about 100 manufacturers of storage bin unloading equipment in the United States (R.A. 166). What percentage of the business it had at any time, either before or after 1958, was not shown. Certainly in the fish processing field its share of business was utterly insignificant. Apart from the petitioner, only two fish processors, out of the 134 fish processors in the United States (Respondent's Ex. L, R.A. 158, 313-318), ever purchased respondent's unit, one in 1953 (R.A. 142) and the other in 1955 (R.A. 141, 142). As to the sale or use of respondent's system in other fields, the record is silent. After 1958 the respondent advised a number of potential customers who inquired that its unloader was available for use only in the Permaglas Storage Unit (R.A. 17-22), but it does not appear that any one of these potential customers ever bought anything. Thus, the only possible business which could have been affected by the single sale proved was the business involved in that one sale. Of course, competitors were "foreclosed" from that particular sale, as competitors are every time any sale is made. But no one has yet suggested that every seller who sells anything is thereby violating the anti-trust laws. On this aspect of petitioner's cause of action there was a total failure of proof.

The judgment of the court below was likewise correct because petitioner failed to show compensable damage. While petitioner makes the unsupported assertion that

"There was evidence that this enforced tie-in damaged petitioner in the amount of $47,000" (Pet. p. 5), the record demonstrates that there was no proof of this element of the plaintiff's case. As the opinion of the Court of Appeals sets forth, the petitioner had the burden of proving it was wrongfully affected by the sale, and this the petitioner has failed to do.

There being no evidence—and no contention—that respondent's price was unreasonable, the gravamen of the offense, if there were one, would be the insistence by the respondent on the purchase of respondent's system when there was available some other system with which respondent's unloader would have performed satisfactorily. The Court of Appeals found nothing in the record to indicate the existence of any such system, and thus there could be no evidence of damage arising from the sale.

Indeed, petitioner did not in fact purchase anything from respondent but rather purchased the respondent's system from a third party, i.e., Bromfield Manufacturing Co., Inc. Any damage to petitioner from respondent's sale to Bromfield Manufacturing Co., Inc. could at most be incidental. However, the petitioner failed to show that it was wrongfully affected in any way by any sale, either directly or indirectly.

Petitioner's contentions on damages are, in fact, not directed to a sale, but only to the refusal to sell. Petitioner's allegation of damage in its complaint is contained in paragraph 13 (Pet. p. 7-8), which is here quoted in its entirety:

> "13. By reason of defendant's refusal to sell its Harvestore Unloaders to plaintiff except on the condition that plaintiff purchase A. O. Smith Corporation silo bins, plaintiff has suffered a substantial loss and been injured in its business: (1) through the increase in costs to it by being forced to purchase and erect the more costly silo bins manufactured by defendant; (2) by the consequent delay in construction of defendant's silo bins which thereby increased

plaintiff's handling and processing costs during the additional period of construction, and (3) by the possession of silo bins of a type usable in only a portion of plaintiff's business by reason of defendant's illegal action."

While petitioner's proof was insufficient to establish even these asserted damages, inasmuch as it failed to prove the reasonablesness of its alleged excess costs of construction, failed to relate its items of loss to the alleged period of delay, and introduced no evidence of conversion costs of the General American system, the evidence on damages went only to those claims. But those claims of damage, no matter what the state of the proof with respect to them, cannot be recovered in this, or any, anti-trust action.

Those alleged damages stem not from the sale which was made—but from respondent's refusal to sell to General American. As has been pointed out above in this brief, page 9, it is established beyond contention that a refusal to sell is not a violation of Section 3 of the Clayton Act.

In essence those are breach of contract claims. But petitioner voluntarily released the contract claims it had against General American. It cannot now use this anti-trust action as a side door to recover them, particularly since such a route would confer upon it a treble damage windfall. Whatever their nature, however, the only damages asserted by petitioner are those which are based upon the refusal and for them there can be no recovery in this action, which is brought solely under the Clayton Act.

The action of the Court of Appeals in affirming the direction of a verdict for the defendant was plainly correct and certainly not a departure from any accepted principle of judicial conduct. There was nothing for the jury to decide since not only was it established on uncontroverted evidence, a part of which came from the petitioner itself, that there was only one product

involved, but also there was a total failure by the petitioner to prove that a not insignificant amount of commerce was involved and an equally complete failure of petitioner to prove any compensable damages. The discussion in the petition with respect to inferences is totally unrelated to the facts of this case, wherein there was no question of alternative permissible inferences and no question of choosing between contradictory evidence. On the record in this case there was nothing to go to a jury.

This case is essentially trivial. It involves no significant question of anti-trust law or anti-trust policy. It is, basically, an attempt by petitioner to misapply an anti-trust statute and anti-trust decisions in a very particular fact situation, a fact situation which indeed does not involve anti-trust considerations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WARREN F. FARR
50 Federal Street
Boston 10, Massachusetts

Of Counsel,

JAMES N. JOHNSON
JOHN M. HARRINGTON, JR.
WILLIAM D. ANDREWS

ROPES & GRAY
PORTER, LAURITZEN, QUALE, PORTER & ZIRBEL

November 8, 1961